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No. 06-873

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IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, INDIVIDUALLY AND ON BEHALF OF A CLASS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a not-for-profit corporation that has neither a parent nor stockholders.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of businesses, representing an underlying membership of more than three million businesses and organizations of every size in every industrial sector and geographic region of the country. A principal function of the Chamber is to advocate the interests of the business community in courts across the Nation by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses. The Chamber has participated as *amicus curiae* in numerous cases before this Court and the federal courts of appeals that have raised issues of vital concern to the Nation's businesses, including cases construing the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The Chamber participated as *amicus curiae* when this case was previously before the Court. *See* Brief for the Chamber of Commerce of the United States of America, The National Federation of Independent Business Legal Foundation, and the Society for Human Resource Management as *Amici Curiae* in Support of Petitioner, *Mohawk Indus., Inc. v. Shirley Williams, et al.*, 126 S. Ct. 2016 (2006) (No. 05-465). The Chamber again comes before the Court given the compelling nature of these issues to American businesses.

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the Chamber, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief, and their consent letters are on file with the Clerk's Office.

The Chamber recognizes the importance of consistent and disciplined application of RICO to deter and remedy the wrongdoing prohibited by the statute. At the same time, the Chamber is concerned that the statute is now being misused throughout the federal courts against legitimate businesses, in large part because of the potential for plaintiffs to extract windfalls from American businesses through the statute's treble damages provision. *See* 18 U.S.C. § 1964(c).

The court of appeals' holding in this case that plaintiffs adequately pleaded a RICO "enterprise" consisting of the defendant corporation and its alleged agents is part of a dramatic expansion of RICO liability for American businesses. It converts a statute that was designed primarily to deter organized crime into a tool used to induce settlements from legitimate businesses that cannot risk either the possibility of being subjected to an award of treble damages or the reputational injury of being sued in federal court under a statute associated with racketeers and mobsters. This case thus presents the Court with the appropriate vehicle to stop the expansion of the RICO statute beyond the carefully delineated areas mandated by Congress. Because the Eleventh Circuit's decision has far-reaching and disastrous implications for countless businesses and the questions presented in this case have ramifications throughout the federal courts, the Chamber and its members have a strong interest in the Court granting plenary review and correcting the erroneous judgment of the court below.

SUMMARY OF ARGUMENT

As the petition explains, the traditional reasons for granting certiorari are clearly present here. Among other reasons, the decision below implicates a well-developed and deep split among the federal courts of appeals concerning an important and recurring question of federal law on which the

Court granted certiorari last Term in this very case.[2] *See Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 830 (No. 05-465, Oct. 7, 2005); *see also* Pet. 10-24. But, *amicus* wishes to highlight additional reasons why it is important for this Court to again grant certiorari.

In addition to two other critical issues worthy of this Court's review, this case poses the important question "[w]hether a corporation and its agents can constitute an association-in-fact RICO enterprise." Pet. i. The petition persuasively explains how the courts of appeals are deeply divided as to whether such an enterprise can be distinct from the corporation itself and that the correct answer is that such a group cannot constitute a RICO enterprise. Pet. 16-24.

More fundamentally, however, this case raises the "antecedent" question whether "a corporation can [*ever*] be a member of a RICO association-in-fact enterprise." Pet. 20-21. RICO expressly defines an association-in-fact enterprise as "any group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). As the United States conceded when the Court addressed this very same issue last Term, a corporation is not an "individual" under § 1961(4). Brief for the United States as *Amicus Curiae* Supporting Respondents at 6, *Mohawk Indus., Inc. v. Shirley Williams, et al.*, 126 S. Ct. 2016 (2006) (No. 05-465) [hereinafter Brief for the United States as *Amicus Curiae* Supporting Respondents] ("[P]etitioner's premise [that a corporation is not an 'individual'] is correct."). Accordingly,

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[2] The case was briefed on the merits and argued before the Court in April 2006. After deciding *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), the Court issued an order in this case dismissing its partial grant of certiorari as improvidently granted, granting certiorari without limitation, vacating the lower court ruling, and remanding the case to the Eleventh Circuit for reconsideration in light of the *Anza* decision. Pet. App. 31a. As the petition shows, the Eleventh Circuit ignored the central holding of *Anza* on remand. *See* Pet. 10-16. For this reason as well, the Court's plenary review is warranted.

the plain statutory text mandates that a corporation cannot be a constituent of an association-in-fact RICO enterprise.

The courts of appeals have uniformly reached the wrong conclusion on this fundamental, threshold question of statutory construction.[3] Indeed, as discussed below, several members of this Court acknowledged as much when this very issue was argued last Term. The Court should resolve this threshold issue now. Doing so would resolve the issue upon which the courts of appeals *are* deeply divided—*viz.*, whether a corporation and its agents can be an association-in-fact enterprise distinct from the corporation itself. If, as petitioner and *amicus* contend, a corporation can never be part of a RICO association-in-fact enterprise, then it necessarily follows that neither can a corporation and its agents together comprise an association-in-fact enterprise distinct from the corporation.

Moreover, given the present uniformity in the courts of appeals, the Court should seize this opportunity to correct their uniformly wrong result. Indeed, absent immediate correction by this Court, RICO will continue to be used by plaintiffs and their attorneys to engage in meritless litigation against legitimate corporations in order to extract unwarranted settlements from them based on a clearly erroneous interpretation of the statute. And because cases such as this invariably settle, this Court may not soon have another opportunity to address this important question. This Court should not countenance the enormous costs that this would continue to impose on the Nation's economy.

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[3] *See, e.g.*, *United States v. London*, 66 F.3d 1227, 1243 (1st Cir. 1995); *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979); *United States v. Aimone*, 715 F.2d 822, 828 (3d Cir. 1983); *United States v. Najjar*, 300 F.3d 466, 484-85 (4th Cir. 2002); *United States v. Thevis*, 665 F.2d 616, 625 (5th Cir. 1980); *Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989); *United States v. Navarro-Ordas*, 770 F.2d 959, 969 (11th Cir. 1985); *United States v. Perholtz*, 842 F.2d 343, 353 (D.C. Cir. 1988).

ARGUMENT

THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER A CORPORATE DEFENDANT CAN BE A CONSTITUENT OF A RICO ASSOCIATION-IN-FACT ENTERPRISE

Review of the Eleventh Circuit's erroneous and expansive reading of the RICO statute is essential because it is contrary to the statutory text and purpose of RICO. Because the decision below frustrates the operations of numerous businesses by subjecting them to the threat of treble damages and reputational injury, this Court should grant review to prevent the inevitable harm that businesses suffer under the Eleventh Circuit's misinterpretation of the RICO statute.

1. In this case, respondents allege that Mohawk Industries, Inc. ("Mohawk") is liable under RICO because it allegedly hired unauthorized workers and contracted with labor recruiters to assist it in hiring workers. Pet. App. 85a-109a. Respondents do not allege that Mohawk is the enterprise, nor do they allege that any recruiting company is the enterprise. Instead, respondents allege merely that the "association of Mohawk and the recruiters constitutes an association-in-fact enterprise." Pet. App. 102a.

The Eleventh Circuit held that respondents had stated a claim under RICO because Mohawk and the recruiters were a "'loose or informal' association of distinct entities." Pet. App. 8a. Under this reasoning, *all* transactions between a corporation and an individual or entity would subject the corporation to potential RICO liability. Indeed, whenever a corporation joins an individual or entity in a business venture, then, under the Eleventh Circuit's analysis, the two would together constitute a RICO association-in-fact enterprise. Moreover, this concept of enterprise makes it easy for a plaintiff to plead that a corporation participated in the conduct of the enterprise's affairs, *see* 18 U.S.C. § 1962(c), because it need only allege that the corporation exercised some degree of direction or control over the

venture. *See Reves v. Ernst & Young*, 507 U.S. 170, 179, 184 (1993) (describing the "conduct" element as requiring "some degree of direction" and an element of "control" over the enterprise's affairs). Accordingly, so long as a plaintiff can adequately plead a pattern of racketeering activity arising out of the venture, claims that ordinarily could only have been brought against the corporation as, for example, mail or wire fraud actions, *see* 18 U.S.C. §§ 1341, 1343, would instantly be transformed into private RICO claims for treble damages and their attendant stigma, *see* 18 U.S.C. § 1964(c). Such an outcome would "effectively eliminate the enterprise element and drastically expand federal jurisdiction over all business torts which involve use of the mails or telephones." *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146, 1152 (D.N.J. 1983), *rev'd on other grounds*, 742 F.2d 786 (3d Cir. 1984).

RICO was never meant to countenance such a result. To the contrary, the statute's plain text and clear purpose confirm that Congress never intended to "RICO-ize" such broad swaths of business conduct.

a. RICO's plain text makes clear that a corporation cannot be part of an association-in-fact enterprise. The statute expressly defines the RICO "enterprise" to "include[] any individual, partnership, corporation, association, or other legal entity, and *any union or group of individuals associated in fact although not a legal entity*." 18 U.S.C. § 1961(4) (emphasis added). As the United States conceded last Term when confronted with this issue, a corporation is not an "individual" and therefore cannot be part of a union or group of *individuals* associated in fact. *See* Brief for the United States as *Amicus Curiae* Supporting Respondents at 6; Transcript of Oral Argument at 46-48, *Mohawk Indus.*,

Inc. v. Williams, 126 S. Ct. 2016 (Apr. 26, 2006) [hereinafter Transcript of Oral Argument].[4]

The conclusion necessarily follows from the text of § 1961(4) itself. The two clauses of § 1961(4) describe two *distinct* categories of associations which may qualify as RICO enterprises. *See United States v. Turkette*, 452 U.S. 576, 581-82 (1981). The first clause separately lists "any *individual*, partnership, [or] *corporation*" as entities that may constitute RICO enterprises. *See* 18 U.S.C. § 1961(4) (emphases added). The second clause then only includes a "union or group of *individuals*" as a RICO association-in-fact. *Id.* If the term "individuals" in the second clause was meant to encompass "corporations," then the separate listing of "corporations" in the first clause would be redundant and superfluous. It is, however, "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (internal quotation marks omitted).

This distinction between corporations and individuals, moreover, follows from the ordinary usage of the term "individual." That term refers to "a single human being as contrasted with a social group or institution." *Webster's Third New International Dictionary of English Language* 1152 (1969); *see also American Heritage Dictionary of the English Language* 670 (1970) ("A single human being considered separately from his group or from society."). The

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[4] Unlike the courts of appeals, *see supra* note 3, some district courts have reached the correct result on this question. *See, e.g., United States v. McClendon*, 712 F. Supp. 723, 729 (E.D. Ark. 1988) (holding that a corporation is not an "individual" who may be a member of an association-in-fact enterprise); *Seville Indus. Mach. Corp.*, 567 F. Supp. at 1151 (holding that two corporations and two natural persons cannot constitute an association-in-fact enterprise).

definitional provision employed by Congress, the Dictionary Act, 1 U.S.C. § 1, which sets forth Congress's default statutory definitions, similarly distinguishes between an "individual" and a "corporation." It thus defines "person" to include "*corporations*, companies, associations, firms, partnerships, societies, and joint stock companies, as well as *individuals*." 1 U.S.C. § 1 (emphases added). In other words, the Dictionary Act, like common usage, recognizes that the term "individual" in a federal statute does not ordinarily refer to a "corporation." *See id.*

Finally, RICO's other provisions confirm that a "corporation" is not an "individual" and, therefore, cannot be part of a "union or group of *individuals* associated in fact." A companion provision, § 1961(3), defines "person" as "any *individual or entity* capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (emphasis added). The separate mention of "entity" indicates that Congress did not intend "individual" to embrace formal legal entities such as corporations.[5]

In short, the plain language of § 1961(4) illustrates that "whatever an individual is it's different than a corporation." Transcript of Oral Argument at 31 (statement of Roberts, C.J.).[6] And indeed, although some courts of appeals have

[5] *See also, e.g.*, 18 U.S.C. § 225 (setting the maximum fine for one who "organizes, manages, or supervises a continuing financial crimes enterprise" at $10 million "if an individual," and twice that "if an organization"); U.S. Sentencing Guidelines §§ 5E1.1, 8A1.2 (distinguishing between "individual" and "organization" for purposes of sentencing); *Blankenship v. W. Union Tel. Co.*, 161 F.2d 168, 169 (4th Cir. 1947) (concluding that the Fair Labor Standards Act's definition of "person" as an individual, partnership, or other legal entity signaled that a partnership was not an individual within the meaning of the Act).

[6] During oral argument on this issue last Term, several of the members of this Court recognized the persuasiveness of this position. *See* Transcript of Oral Argument at 29 (Chief Justice Roberts: "[I]t does seem kind of strange to encompass [corporations] under the term individuals when the same statute uses individuals and corporations separately."); *id.* at 30-31 (Justice Scalia: "A union of individuals or a group of individuals.

held that a corporation can be an "individual" under § 1961(4),[7] here, the question is not really in dispute. To the contrary, last Term the United States as *amicus curiae* conceded that a "corporation" is not an "individual" within the meaning of § 1961(4). *See* Brief for the United States as *Amicus Curiae* Supporting Respondents at 6; Transcript of Oral Argument at 46-48. Instead, the United States argued that the statutory enumeration in § 1961(4) was not *exhaustive* because it begins with the word "includes." *Id.* This too, however, is clearly wrong.

Congress frequently uses the term "includes" to introduce an exhaustive, rather than illustrative, statutory definition. *See Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125-26 (1934). Section 1961(4) clearly exemplifies such an exhaustive usage. That section lists seven disparate forms of RICO enterprises, not a single example or an "obviously" incomplete listing. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78-79 (2002) (holding that an illustrative reading of "includes" is appropriate where it introduces a single example or an "obviously" incomplete listing). The inclusion of the phrase "or other legal entity" in the first clause, the omission of similar catch-all language or any

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You're still stuck with individuals . . . Either union means labor union or it means a union or group of individuals . . . So, you know, you're just as bad off."); *id.* at 31 (Chief Justice Roberts: "Well, it's not defined in the statute, but the prior list in the same sentence says individual, partnership, corporation. So you assume whatever an individual is it's different than a corporation or they wouldn't have to say corporation again."); *id.* at 32 (Justice Kennedy: "[W]e usually talk about person can mean a corporation. This says individual. A person is defined in – sub (3) just above it. A person includes any individual or entity. Then the next thing says individual. So . . . it doesn't sound like a corporation.").

[7] *See, e.g., United States v. Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985) ("a group of corporations can be a 'group of individuals associated in fact'") (citation omitted).

mention of formal legal entities in the second clause, and the narrower use of "individual" in companion provisions evinces that Congress carefully drafted § 1961(4) as an exhaustive, rather than illustrative, definition of "enterprise."

Comparison with companion provisions removes any possible doubt that Congress employed "includes" in its exhaustive aspect in § 1961(4). Three other subsections of § 1961 use the term "includes" to introduce a statutory enumeration. *See* 18 U.S.C. §§ 1961(3), (9), (10). In each of these other three subsections, "it is unquestionable" that the term "includes" introduces an exhaustive list. Transcript of Oral Argument at 48 (statement of Scalia, J.) (noting that at oral argument the United States "did not refute the point that in other sections where it says includes, it is unquestionable that it is exclusive"). Section 1961(9), for example, provides that "'documentary material' *includes* any book, paper, document, record, recording, or other material." 18 U.S.C. § 1961(9) (emphasis added). The last three words would be superfluous if Congress regarded "includes" as a nonexclusive term. Similarly, § 1961(3) provides a comprehensive definition of "person," which "*includes* any individual or entity capable of holding a legal or beneficial interest in property." *Id.* § 1961(3) (emphasis added). Finally, § 1961(10) provides a definition of "Attorney General" which is clearly comprehensive. *See id.* § 1961(10) ("'Attorney General' *includes* the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter.") (emphasis added).

In addition, when Congress wanted to indicate that a list in RICO was illustrative and not exhaustive, it used the phrase "including, but not limited to." *See* 18 U.S.C. § 1964(a) (using phrase "including, but not limited to" twice to

clarify that a list is incomplete). The absence of that phrase from § 1961(4) is telling.

Indeed, a contrary understanding of the term "includes" would strip Congress's careful statutory definition of all meaning. If, as the United States argued last Term, this Court should look to the meaning of the term "enterprise" in isolation and ignore Congress's definition of that term, *see* Brief for the United States as *Amicus Curiae* Supporting Respondents at 12-13, that definition becomes utterly meaningless. That is not how Congress writes statutes, or how courts interpret them.

In all events, if there is any ambiguity in the scope of § 1961(4), the rule of lenity requires that it be resolved in favor of the defendant. The rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997). "RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring in the judgment); *see also Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004) (the rule of lenity applies to statutes which have both civil and criminal applications) (citing cases). Thus, even if another reading of the statute is plausible, which it is not, § 1961(4)'s use of "includes" is "at least ambiguous," Transcript of Oral Argument at 47 (statement of Scalia, J.), and the rule of lenity requires that it be construed according to its narrowest reading—that only natural persons, and not legal entities such as corporations, may be constituents of an association-in-fact enterprise.

b. The plain meaning of § 1961(4) is in full accord with RICO's legislative history and purpose. The legislative history makes clear that Congress's avowed purpose in enacting RICO was "to seek the eradication of organized crime in the United States" and to counteract organized crime's infiltration and corruption of "legitimate businesses

and labor unions." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970). Thus, as Justice Alito has explained, RICO had "two aims: . . . to make it unlawful for *individuals* to function as members of organized criminal groups [and] . . . to stop organized crime's infiltration of legitimate businesses." Samuel Alito, Jr., *Racketeering Made Simple(r)*, in *The RICO Racket* 1, 3-4 (G. McDowell ed., 1989) (emphasis added).

Here, § 1961(4) fully meets these purposes under a plain language construction. The first clause of § 1961(4) defines a RICO "enterprise" to include any "individual, partnership, corporation, association, or other legal entity." It thus prohibits organized crime from infiltrating these legitimate businesses and using them for their nefarious purposes or from starting pretextually legitimate businesses in order to mask criminal activity. But § 1961(4) also recognizes that organized crime does not always—or even usually—act through the corporate form. To the contrary, it often acts through a loose association of individuals—as, for example, the fictional Corleone or Soprano families. The second clause of § 1961(4) thus defines a RICO enterprise to encompass a "union or group of individuals associated in fact although not a legal entity."

Nothing in RICO's text, legislative history, or overriding purpose, however, suggests that Congress was concerned about confederations of *corporations* banding together into a RICO "enterprise." To the contrary, Congress "had no reason whatsoever [for criminalizing] associations . . . of corporations with each other. And to do that, adding that in when it doesn't say that, would RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity . . . . But Congress wouldn't have wanted to [do] that [as that had nothing] to do with organized crime . . . or [with] the taking over of legitimate enterprises [by organized crime]." Transcript of Oral Argument at 44-45 (statement of Souter, J.). Put another way, "Congress did not enact RICO because it was

concerned that criminal conspiracy law applied to corporations . . . . The whole point is that [Congress] had something significantly different in mind, and your allegations in the [*Mohawk*] complaint seem to be fully met by application of criminal conspiracy law." *Id.* at 36 (statement of Roberts, C.J.). In other words, RICO is not—and was never understood to be—necessary to prevent businesses from banding together to engage in illegal activities, because such concerns were already fully and adequately addressed in other laws, including, among others, statutes prohibiting criminal conspiracy, 18 U.S.C. § 371, and mail and wire fraud, *see* 18 U.S.C. §§ 1341, 1343.

Indeed, if anything, RICO was intended to *protect* businesses, not to impose a new and onerous burden on them by unnecessarily "RICO-izing" ordinary business transactions and subjecting businesses to RICO's treble damages provision. RICO's legislative history portrays corporations primarily as victims, rather than perpetrators, of organized crime, and shows the purpose behind RICO to be the cleaning up of infiltrated corporations and organizations through the prosecution of individual RICO defendants. *See, e.g.*, 116 Cong. Rec. at 602 (1970) (remarks of Sen. Hruska) (Title IX "contains a rather novel, and in my opinion, a most promising and ingenious proposal for crippling organized crime's relatively recent, but spectacularly successful, emergence into the field of legitimate business"); *id.* (Title IX was "designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate busines[s]"); S. Rep. 91-617, at 1 (1969) (the "money and power" of organized crime "are increasingly used to infiltrate and corrupt legitimate business"). It would be the height of irony to transform RICO from a shield designed to *protect* legitimate businesses from misuse into an arbitrary and discriminatory weapon for imposing steep and onerous *costs* on businesses.

It is thus not at all surprising that in the course of adopting the RICO statute, Congress considered—and rejected—a proposal that arguably would have encompassed a combination of corporations. *See* S. 2187, 89th Cong. (1965). That proposal, Senate Bill 2187, would have outlawed membership in the Mafia or "any other organization having for one of its purposes" the commission of racketeering acts, *id.* § 2(a), and defined "organization" as "any group, society, confederation, or syndicate whose aims, objectives, and purposes" included the commission of racketeering-type acts, *id.* § 3(2). After Senate Bill 2187 failed to garner support, RICO was drafted with a specialized definition of "enterprise" that omitted the broad "any group" language.

In short, RICO's legislative history confirms what its text makes plain: A corporation is simply not an "individual" and, therefore, may not be part of a "union or group of individuals associated in fact."

c. Congress had sound practical reasons to fashion this focused and limited definition of an association-in-fact enterprise, and these reasons are frustrated by the prevailing misinterpretation of the courts of appeals. An enterprise consisting of a single entity is easy to identify. *See Bennett v. Berg*, 685 F.2d 1053, 1060 (8th Cir. 1982) ("An enterprise is particularly likely to be found where . . . the enterprise alleged is a legal entity rather than an 'associational enterprise.'"). But identifying association-in-fact enterprises presents unique challenges for courts. *See Chang v. Chen*, 80 F.3d 1293, 1297 (9th Cir. 1996) (noting that the issue of how much structure an association-in-fact enterprise must have "has divided the circuit courts that have considered it"). Some of these difficulties may reflect the inherent imprecision in the phrase "union or group of individuals associated in fact," but it is difficult to imagine that Congress would have intended to compound these difficulties by broadening the definitional sweep of § 1961(4) beyond what was necessary to achieve the goal of eradicating organized

crime. Expanding the list of potential association-in-fact constituents to include formal legal entities such as corporations threatens to do just that.

In sum, there is no statutory or historical reason to adopt the "strange" conclusion that RICO association-in-fact enterprises "encompass [corporations] under the term individuals when the same statute uses individuals and corporations separately." Transcript of Oral Argument at 29 (statement of Roberts, C.J.). This Court's full consideration is plainly warranted to correct the courts of appeals' rulings to the contrary.

2. The court below's misconstruction of RICO's association-in-fact enterprise requirement, if left intact, will continue the long march of the various courts of appeals to transform routine corporate conduct into conduct actionable under RICO. If this trend continues, then RICO will continue to impose significant and unintended costs on American businesses. And if review is not again granted in this case, plaintiffs and their attorneys will be further emboldened to hound American businesses, even when those businesses are engaged in standard, necessary, and lawful business practices.

a. Under the view adopted by the Eleventh Circuit and other courts of appeals, any "'loose or informal' association of distinct entities" is a RICO association-in-fact enterprise. *See* Pet. App. 8a. This renders virtually every relationship between a corporation and an individual or entity subject to potential RICO liability. Such a combination would, by definition, constitute an "enterprise," and it would be easy to allege that the corporation, as a key member of that so-called enterprise, was conducting its affairs. *See supra* Section 1, at 5-6. All a plaintiff need do, therefore, is allege a pattern of racketeering activity based, in many cases, on as few as two predicate acts from the myriad ones listed in 18 U.S.C. § 1961(1). If the plaintiff can meet this minimal pleading burden, it will survive a motion to dismiss and force the

corporation either to settle or endure the risk of treble damages and the stigma attached to the RICO statute.

b. This "RICO-ization" of ordinary business conduct imposes enormous costs on the national economy.

RICO's civil action is an "unusually potent weapon—the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Designed to deter and root out organized crime, its expanding scope through lower court interpretations provides an improper tool to induce settlements from legitimate businesses that cannot risk the possibility of being labeled as racketeers or subjected to an award of treble damages. *See* 18 U.S.C. § 1964(c). "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." *Sedima v. Imrex Co., Inc.*, 473 U.S. 479, 506 (1985) (Marshall, J. dissenting) (citing Arthur F. Mathews, *et al.*, *Report of the Ad Hoc Civil RICO Task Force*, American Bar Ass'n Section of Corp. Banking & Bus. L., at 69 (1985)).

In addition to financial penalties, businesses experience "an almost inevitable stigmatizing effect" when sued in federal court under a statute associated with racketeers and mobsters. *Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990). And with these twin tools at the ingenuous plaintiff's disposal, "RICO is evolving into something quite different from the original conception of its enactors." *Sedima*, 473 U.S. at 481, 500.

Indeed, the impact of the rule adopted by the courts of appeals on this question is evident, as the potential for treble damages has made RICO one of the most popular litigation tools of the plaintiff's bar. According to the Administrative Office of the U.S. Courts, 678 civil RICO actions were filed in federal court in the year ending March 31, 2006 (of which two were filed by the United States); 840 in the year ending

March 31, 2005 (of which eight were filed by the United States); 695 in the year ending March 31, 2004 (of which four were filed by the United States); 845 in the year ending March 31, 2003 (of which ten were filed by the United States); 707 in the year ending March 31, 2002 (of which seven were filed by the United States); and 791 in the year ending March 31, 2001 (of which four were filed by the United States). *See Federal Judicial Caseload Statistics*, Table C-2 (U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit) for each respective year, *available at* http://www.uscourts.gov/library/caseloadstatistics.html) (last visited Jan. 22, 2007).

Although the Administrative Office does not account for which RICO cases involve corporate defendants, it is the experience of *amicus* and its members that the vast majority of these cases have been filed against corporations. Thus, while no precise number can be given, it is plain that with an average of roughly 760 civil RICO cases being filed each year coupled with the potential for treble damages, this "RICO-ization" of criminal and civil law threatens a significant portion of American businesses and thus the American economy.

RICO was not designed to do this. For, RICO is not a general criminal conspiracy statute or a basis for invoking federal jurisdiction over business torts. Instead, it is an "enterprise" statute aimed at persons, especially organized criminals, who victimize separate enterprises or use them as a vehicle for criminal activity. As several of this Court's members acknowledged at the April 2006 oral argument in this very case, to include corporations in the definitional sweep of "individuals" would do nothing to promote RICO's aim of eliminating organized crime.[8]

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[8] *See, e.g.*, Transcript of Oral Argument at 44-45 (Justice Souter: noting that Congress had "no reason" for extending the definition of enterprise to "associations . . . of corporations" because that that "would RICO-ize, with its treble damages and private plaintiffs and everything, vast

Nor is this potential for abuse theoretical. As Justice Marshall noted in 1985, "the ABA Task Force that studied civil RICO found that 40% of the reported cases involved securities fraud and 37% involved common-law fraud in a commercial business setting." *Sedima*, 473 U.S. at 506 (Marshall, J., dissenting). As shown above, this problem has only expanded in the intervening years with nearly 760 civil RICO cases being filed in the federal courts each year. Thus, RICO claims alleging commercial fraud are regularly brought against legitimate businesses, exposing businesses to RICO's treble damages provision and attendant stigma.[9] This "extortive" activity is precisely what Justice Marshall feared when, in *Sedima*, he decried RICO's "frequent[]" use "against legitimate businesses in ordinary commercial settings" and observed that "[m]any a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit." 473 U.S. at 506 (Marshall, J., dissenting). And this will only continue unless this Court acts to halt the misinterpretation of RICO in the lower courts.

c. Finally, the Court should resolve this issue now. As discussed above, the members of this Court recognized the importance of this issue last Term during oral argument. Resolution of this question, moreover, would resolve the deep circuit split over the question whether a corporation and its agents can constitute an enterprise distinct from the

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amounts of ordinary commercial activity" and activity that "has not to do with organized crime" or "with taking over legitimate enterprises"); *id.* at 44 (Justice Breyer: noting that Congress probably "put in the word group of individuals" because "it's possible that Congress was worried about organized crime taking over the pizza parlor or taking over a trades union or taking over a similar kind of enterprise").

[9] *See, e.g.*, *World Wrestling Entm't, Inc. v. Jakks Pac., Inc.*, 425 F. Supp. 2d 484 (S.D.N.Y. 2006); *Z-tel Commc'ns, Inc. v. SBC Commc'ns, Inc.*, 331 F. Supp. 2d 513 (E.D. Tex. 2004); *All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F. Supp. 2d 1161 (C.D. Cal. 2003).

corporation itself. Finally, as the courts of appeals have uniformly come out the wrong way on this question, immediate intervention by this Court is necessary. As Justice Marshall correctly recognized in *Sedima*, given the enormous risks involved in defending RICO actions, most of these cases—including those involving meritless claims—will settle. This case thus presents the Court with a rare vehicle to resolve this vitally important issue. And absent such resolution, businesses across the Nation will continue to face the Hobson's choice of litigating or settling meritless claims based on an erroneous interpretation of the RICO statute. This Court should not countenance such a result, particularly with respect to a statute like RICO, with its already expansive reach, trebling of damages, and attendant stigma of being sued under a statute intended to target organized crime.

* * *

At bottom, the decision below threatens to convert a statute that was designed primarily to deter organized crime into a tool used to induce settlements from legitimate businesses that cannot risk either the possibility of being subjected to an award of treble damages or the reputational injury of being sued in federal court under a statute associated with racketeers and mobsters. And the impact of the decision below upon the business community cannot be understated: The Eleventh Circuit's judgment and the statutory misinterpretation underlying it will have far-reaching and disastrous implications for countless businesses. Given that the Eleventh Circuit's holding threatens to encumber businesses and to thwart a carefully crafted congressional statute, this Court's review is immediately warranted. Indeed, because most of these cases settle because of the lower courts' unitary, yet erroneous, view of the law, this case presents the Court with a rare vehicle for resolving this important issue. *Amicus* thus urges this Court to grant certiorari in order to curb the lower courts' erroneous expansion of the RICO "enterprise"

definition and to give effect to Congress's limitation of that definition to "a group of *individuals* associated in fact although not a legal entity." *See* 18 U.S.C. § 1961(4) (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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